Public Support for Judicial Nominations: Evidence from a Discrete-Choice Experiment[*]

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June 16, 2017

ABSTRACT

How do citizens evaluate potential constitutional court candidates? In our study, we seek to disentangle the quality and the ideological dimensions, and evaluate their relative importance for gaining public support of a judicial nominee and identifying the type of nominee the public prefers. Furthermore, we are able to identify the relative weight people place on the quality of a nominees vice versa the political dimension when evaluating constitutional court candidates. To do so, we administered a discrete-choice experiment to a random sample of German citizens. We repeatedly present respondents pairs of profiles of judicial nominees that depend on personal characteristics, characteristics of who nominated them, and the nominees' political leanings - all of whom were fully randomly generated. We evaluate public ratings of those profiles and which profiles gain the most public support. We find that the perceived quality of a candidate can compensate to some degree for potentially missing political independence. Moreover, studying the public's ideal judge has major implications for understanding the mechanisms that explain legitimacy attributions regarding the judiciary as non-majoritarian institution.

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1   Introduction

Non-majoritarian institutions are mushrooming around the globe. Elected officials delegate more and more power to non-elected actors to make public policy thereby transforming the democratic system of governance. Regulatory bodies staffed with specialists, central banks or highest courts are prime examples of such institutions. Because of their role in the chain of delegation within the public policy-making process non-majoritarian institutions act as agents for elected officials in their role as principals. This development obviously undermines the traditional understanding of democratic accountability and, thus, has implications for how legitimate the public perceives such system of governance including the relevant political actors. Given that elected officials as principals are also themselves agents of the public, we argue, that the selection process to staff non-majoritarian institutions becomes an important but yet not well understood mechanism to legitimize the policy-making process. We assume that if elected officials consistently selects candidates to staff such intuitions the public does not prefer, decisions of such institutions are less likely to be seen as legitimate.

In the following we focus on a particular non-majoritarian institution, namely on constitutional courts. While candidates for constitutional courts are never publicly elected, we provide a research design that allows us to understand which candidates the public as the ultimate resource of legitimacy would prefer. The findings help scholars to understand mechanisms that explain popular support for the judiciary. Moreover, this has implications for understanding the public perceptions of non-majoritarian institutions and their decisions as legitimate even without being able to hold them directly accountable.

How do citizens evaluate potential constitutional court candidates? On the one hand, surveys frequently indicate that the public trusts an independent judiciary more than any other political institution. This should imply a preference to select the most qualified nominee. On the other hand, given the political implications of constitutional court decisions, people should also be interested in nominees sharing similar political attitudes. Prior research studying judicial nominations has either focused on the politically institutionalized process when nominating judges or has confounded the quality as well as the ideological dimension when studying the public's support for judicial nominations. In our study, we seek to disentangle the quality and the ideological dimensions, and evaluate their relative importance for gaining public support of a judicial nominee and identifying the type of nominee the public prefers. Furthermore, we are able to identify the relative weight people place on personal properties of nominees vice versa their quality and

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political attitudes. To do so, we administered a discrete-choice experiment (Hainmueller, Hopkins and Ya-mamoto, 2013; Hainmueller and Hopkins, 2015; Louviere, Hensher and Swait, 2000) to a random sample of German citizens. We repeatedly present respondents pairs of profiles of judicial nominees that depend on personal characteristics, characteristics of who nominated them, and the nominees political leanings - all of whom were randomly generated. We find that the perceived quality of a candidate can compensate to some degree for potentially missing political independence. Citizens are generally willing to prefer a highly qualified but political candidate over less-qualified but politically independent nominee as long as the political judicial candidate is not to extreme and leans towards a mainstream party.

2 Judges as Members of Non-Majoritarian Institutions

In this section we argue that courts are similar to *Non-Majoritarian Institutions* (NMIs). Political rulers select judges establishing a principal-agent relationship. Throughout this process paying attention to the public's interest is vital. As recipient of judicial power the public will need to perceive the judiciary as legitimate. In this regard legitimacy is a function of the quality of judicial decision-making as well as the individual preferences towards a judicial decision. Thus, selecting candidates for the bench the public will trade between (1) the legal quality of a nominee and (2) the partisan leaning of a nominee.

2.1 Courts as Non-Majoritarian Institutions in a Principal-Agent Framework

In democracies, elected officials frequently empower non-elected actors, such as central bankers or regulatory bodies in areas such as telecommunications, health care or antitrust with specialized tasks. The so created *Non-Majoritarian Institutions* (NMIs) "possess and exercise some grant of specialized public authority, separate from that of other institutions, but are neither directly elected by the people, nor directly managed by elected officials" (Thatcher and Sweet, 2002, 2). The dominant approach to analyze the relationship between elected institutions and their unelected counterparts is principal-agent theory (Bendor, Glazer and Hammond, 2001; Thatcher and Stone Sweet, 2003; McNamara, 2002). The principal, in our case a political ruler, outsources a task to isolate it from political pressure delegating it to an agent, in our case a constitutional court (see Thatcher and Sweet, 2002, 3, Coen and Thatcher, 2005, 332).

For principals, delegation is costly. First, they have to give up power they previously possessed, and second, they have to pay the costs of the actual process of delegation (Thatcher and Sweet, 2002, 4). More-

over, the principal can only gain from an agent if granting this agent a "zone of discretion" (Thatcher and Sweet, 2002, 5). Eventually, the expected benefits from delegation must outweigh the costs from delegation (Majone, 1999, 2001*a*; Egan, 2005; Levy and Spiller, 1996; Epstein and O'Halloran, 1999).

The outlined design of NMIs in a principal-agent framework is to a large extent reflected in the design of the judiciary (see Thatcher and Sweet, 2002; Sweet, 2002). Constitutional courts are granted large powers by political rulers who originally possessed those powers and gave them up (Sweet, 2002, 88). Ideally the judiciary's task is to settle conflict independent from debates in the political sphere. In this regard Easton (1965, 263-264) has outlined that the legal process "takes an existing controversy, removes it from the open political arena, and siphons it through special channels so that the effects of the cleavages are controlled." Through this disaggregation from political pressure, courts become empowered to solve and mediate when political conflict arises. In particular constitutional courts are the response to the dilemma of political parties who agreed to the benefits from the constitutional "rules of the game", but disagreed on the precise content of those rules (Sweet, 2002). By granting judges the authority to interpret the rules of the game their "zone of discretion" is usually large (Thatcher and Sweet, 2002, 14). Because of this large discretion courts are sometimes referred to as "trustees" with broader independence and more extensive power than typical agents (Majone, 2001*b*; Stone Sweet, 2000; Sweet, 2002; Thatcher and Sweet, 2002).

2.2   The Challenges of Delegating Power to Courts

Courts possess broad (political) powers but the capabilities of political rulers to oversee judicial action is limited (Sweet, 2002, 98). Therefore, the latter face the challenge that judges can easily develop own interests, and these interests may diverge from the interests of the political rulers. This is commonly known as agency loss (see Jensen and Meckling, 1976, 308-310). Hence, as principals political rulers will apply strategies to prevent losing ties with the court as trustee. Selecting favorable judges is the easiest way to do so (Stone Sweet, 2000). In fact, international comparison shows that political rulers overwhelmingly control the selection of judges (Hönnige, 2011; Kneip, 2008). However, why is it that political rulers in democracies do not always choose judges who hold strong party ties?

The reason is that decisions taken by judges will not solely affect the rulers (as principals) but instead the decisions have implications for the society at large. The electoral connection between the society at large and the political rulers makes the latter the agent of the former. Hence, the society at large is a "second-order" principal when characterizing the interaction between political rulers and judges. In par-

ticular, political rulers are dependent on the public who in turn is effected by judicial decisions. This is why vote- and office-seeking political rulers cannot simply appoint judges making decisions in there own partisan interest. Instead, they need to appoint judges that, if they make a decisions in a political interest this decision is also accepted by the public. In other words, the actions by the court as a trustee to political actors need to be perceived as legitimate by the public at large. This is why when selecting judges, democratic political rulers need to pay attention to the preferred traits the public looks for when facing the judiciary. These traits are the ones that facilitate acceptance of court decisions and the legitimacy of the judiciary.

In general, the legitimacy of non-majoritarian institutions - in our case of constitutional courts - depends on maintaining the belief that they are the most appropriate ones to address the functions entrusted in them (Majone, 1999, 22). Accordingly, non-majoritarian actors need to appear as experts being specifically able to cope with complex tasks or in the case of judges with legal questions. These questions would not be addressed otherwise. However, courts lack an electoral connection providing them with direct legitimacy (Caldeira and Gibson, 1992, 635). Instead, once being appointed to the bench, the judges can create legitimacy only through their decisions. Hence, the legitimacy of the judiciary originates from the public acceptance of the answers judges present to legal questions. This makes output-legitimacy (see Maggetti, 2010, 3, Mügge, 2011, 57) central for the functioning of NMI's in general and in particular for the judiciary.

How will the public perceive the legitimacy of a legal decision? In a dispute individuals face a trade-off. On the one hand, everyone expects a certain degree of quality for legal decisions. Only a reasonable, transparent and understandable decisions taken by highly qualified judges will ensure that each party involved in a conflict will not just understand a judicial outcome but also be able to relate to it. On the other hand, a rational actor involved in a dispute will still have an interest that the outcome is in his or her favor. This is why individual actors should prefer judicial decisions made by judges sharing their interests. Hence, personal and professional traits of judges become essential when discussing the origin of judicial legitimacy.

Indeed, there is empirical support that such a trade-off between the quality dimension and the political dimension exists for the public when it comes to judicial decision-making. Studies suggest that unanimous court decisions signaling judicial unity increase a court's legitimacy among the public (Ulmer, 1986; Walker, Epstein and Dixon, 1988) as well as a courts general appearance as apolitical (Baird and Gangl, 2006; Ramirez, 2008; Farganis, 2012). Unity among judges leads to the impression that the court has found a "correct" legal answer while disagreement among judges maybe perceived as an ideological divide among them undermining their legitimacy (Smith, 1990). This makes a judicial nominee's reputa-

tion as fair, non-partisan and impartial a key to legal legitimacy. Several studies have shown that judicial legitimacy decreases if judges are selected in a partisan election (Choi, Gulati and Posner, 2010; Jamieson and Hardy, 2008; Geyh, 2003). These partisan elections erode the public's trust in the bench (Jamieson and Hardy, 2008, 14). Nevertheless, there is also research that shows that the public views court decisions through subjective ideological lenses. Ones ideological proximity to the Court correlates with perceptions of the Court's legitimacy (Bartels and Johnson, 2010; Christenson and Glick, 2015; Johnston, Hillygus and Bartels, 2014).

To sum up, these mixed empirical findings suggest that the quality dimension and the partisan dimension is intermingled when the public selects judges. How will the public perform such a trade-off when facing two (ideal-typical) judicial candidates: (1) one with shared preferences and ideological views versus (2) one with high legal qualities appearing as politically independent and impartial?

2.3 Disentangling the Political and Quality Dimension

Based on our considerations we assume that the public will select a judicial candidate whose characteristics are a mixture of (1) professional traits ensuring a high quality in judicial decision-making as well as (2) personal (political) traits ensuing that a nominee shares political believes with the public.

If professional traits are more important than personal traits then the public will place strong emphasize on the legal qualification of the respective candidate for the bench. Ideal nominees will be characterized by not leaning towards a party, having a professional career in the judiciary, and being confirmed by an institution that has no clear political preferences. If the political leaning of a judicial nominee is known, then this should decrease the judge's chances to be selected for the bench. Such a public would prefer a nominee without a party leaning. Likewise, if the nominee has a prior judicial career as judge, prosecutor, or lawyer this should enhance this nominee's chances to be selected to the bench. Such a career highlights an experience with law and dispute resolution and a commitment to the learned profession. Lastly, the public would prefer a candidate whose selection was based on a transparent selection mechanism, for instance involving non-political experts, or a confirming institution without political preferences.

The opposite holds true when a judicial nominee is preferred who shares political beliefs with the public. In this case, the public will place stronger emphasize on characteristics highlighting political views and a former political engagement. These characteristics are the partisan leaning of a judicial nominee, the prior occupation of a candidate and the confirming institution when it embodies a known political prefer-

ence. Accordingly, if the partisan leaning of a judicial nominee is known then this will enhance the judge's selection to the bench when the person selecting the judge identifies with the party leaning of the judicial nominee. Moreover, if a nominee had a prior political career then this will positively influence this nominee's selection to the bench. This is true to the extent that a principal derives the political commitment of a judicial candidate from a prior engagement to prevent agency loss. Finally, institutions with a known party preference, such as the government, will drive a partisan judicial election rather than an independent expert committee.

It is important to note that we are not saying a candidate who is selected on a stronger basis of partisanship is less legally qualified than a candidate selected based on judicial characteristics. Instead, both candidates are most likely equally qualified and legitimized.

To summarize, we have outlined that the role of the judiciary can be perceived in a principal-agent framework. In general, such a relationship is dependent on the agent being perceived as legitimate by the public. Otherwise the agent - the court - is incapable of making decisions and the principal - the political ruler - cannot benefit from the relationship. This is why it is important to account for the professional and personal traits that drive the judicial selection among the public. It is to assume that the public will prefer a judge with (1) high legal qualities and professional training selected by independent authorities but (2) this judge will also embody a political leaning allowing for personal ties between the judge and the public selecting him or her. In what follows, we assess the two dimensions using an experimental research design analyzing the mixture of personal and professional traits of judicial nominees preferred by the public.

3 Empirical Analysis

To what degree are citizens willing to make a trade-off between a politically and ideologically motivated selection of a judge and her quality of a would-be judge for the highest court? A standard survey study employing measures of quality and ideology of a judicial nominee would be one strategy to answer such a question. Most likely, though, both dimensions are non-separable (Stoetzer and Zittlau, 2015) because quality and ideology are bundled together when studying the public's support for particular judicial nominees. Consequently, the respective measures are confounded. The utility derived from the quality dimension depends on the utility derived from the ideology dimension and vice versa.

That is why we employ a particular research design, a so-called discrete-choice experiment (DCE)

(Hainmueller, Hopkins and Yamamoto, 2013; Hainmueller and Hopkins, 2015; Louviere, Hensher and Swait, 2000), that allows us to disentangle the judgmental bases of several dimensions simultaneously. DCEs allow us to infer from respondents choice behavior between pairings of judicial candidates about the relative importance of various potential evaluative dimensions the public employs when reasoning about potential judicial nominees for the Federal Constitutional Court (FCC) judges in Germany.

There are good reasons for as choosing the German Federal Constitutional Court. The FCC is the archetype of a Kelsenian constitutional court, and especially powerful and independent (Kneip, 2008). An appropriate selection of judges is of particular importance to political rulers in such a powerful institutional context. Moreover, the institutional design of the FCC and the selection procedure for members on the bench are adopted by many other democracies worldwide. Comparing and generalizing findings from the FCC to these courts is thus possible.

We implemented our discrete-choice experiment as part of wave 26 of the German Internet Panel (GIP). This survey instrument collects information on political attitudes and preferences of respondents through bimonthly longitudinal online panel surveys. Although administered online all surveys are based on a random probability sample of face-to-face recruited households from the German population, which were provided with access to internet and special computers if needed (Blom, Gathmann and Krieger, 2015). Wave 26 (Version 1, 13 Jan 2017) includes $N = 2,749$ registered participants and is representative of both the online and offline population aged $16-75$ in Germany. The next section will describe how we implement our DCE within this survey instrument.

3.1 The Judicial Nominee Experiment

We implemented our *Judicial Nominee Experiment* using altogether six screens. Each respondent saw six pairs of profiles of judicial candidates that were presented side-by-side, with each pair of profiles on a separate screen. We describe profiles of our hypothetical would-be judicial nominees along seven attribute categories, from which we build our independent variables. Each of the attributes categories can take on multiple values. Attribute categories include (1) current occupation (politician, law professor, lawyer, judge at federal or regional court, prosecutor), (2) partisan leaning (none, CDU, SPD, FDP, Left party, Greens, AfD), (3) nominating institution (President, Upper house, *Bundestag* with and without public hearings, Constitutional Court Judge Selection Committee of the *Bundestag*, the government, non-partisan expert committee) (4) age (35, 40, 45, 50, 55, 60 or 65 years old), (5) origin (East or West German, each with
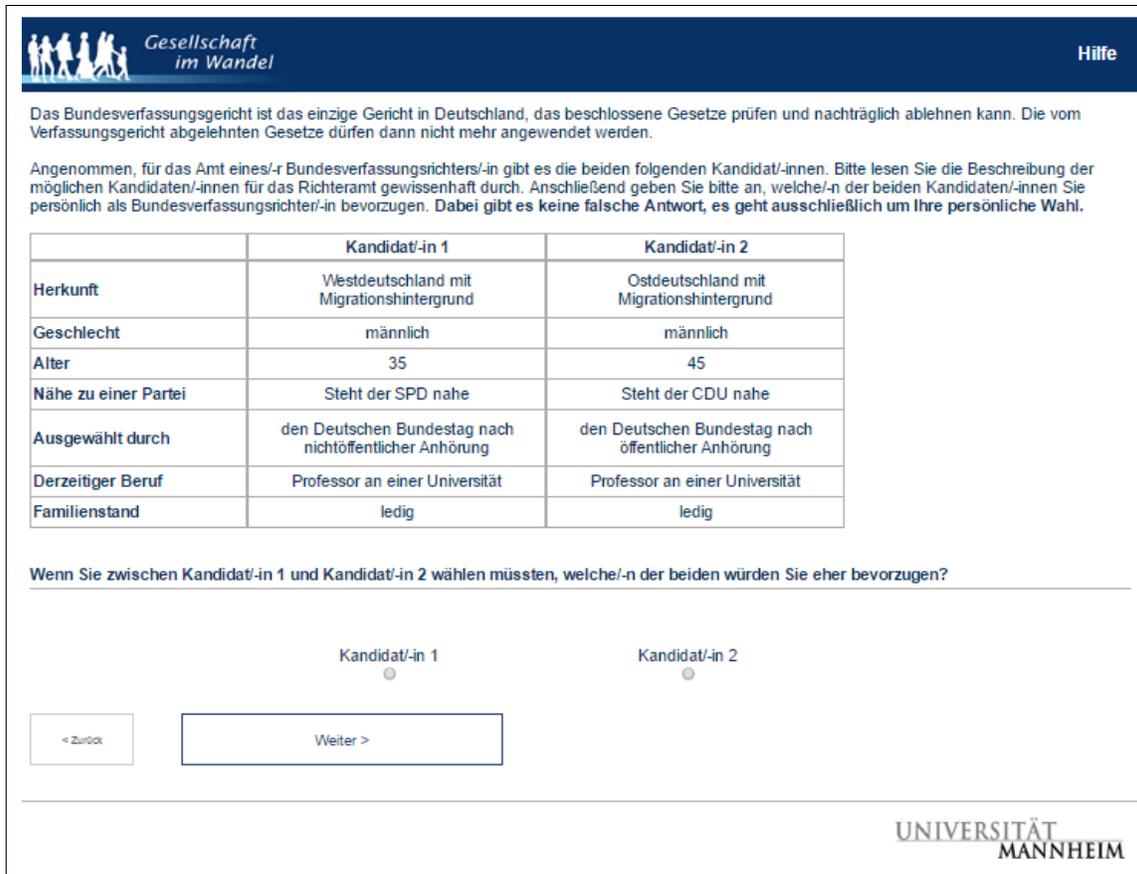
Figure 1: *The following screen shot documents what respondents viewed at each stage of the discrete choice experiment. Each respondent saw six of such screens. While the order of all seven attributes was randomized between respondents, the order did not chance from screen to screen once selected for each respondent. Nevertheless, the values for each attribute that make up each candidate profile have been randomized across screens and respondents.*

or without migrational background), (6) gender (female, male), and (7) marital status (same-sex marriage, divorced, married, single, widowed). Thus, theoretically we can generate $(6 \cdot 7 \cdot 7 \cdot 7 \cdot 4 \cdot 2 \cdot 5 =)$ $82,320$ different judicial candidate profiles. In practice, each respondent gets to see a random subset from this universe of judicial candidate profiles.

Moreover, in order to minimize the potential impact of the order in which these attributes are presented we randomized the order of the attributes between respondents. In order to ease the cognitive burden of respondents we fixed the randomly chosen order of the attributes across the six screens. We present a random screen shot in Figure 1. After presenting each candidate pairing, respondents were asked on each screen to choose between the two presented candidate the one they prefer to be a judge at the German FCC. Thus, ideally each respondent made up to six decisions between 2×6 randomly generated profiles of judicial

nominees. The choice outcomes of these decisions serve as our dependent variable.

For example, we might be interested whether respondents generally tend to choose female over male candidates. Such a gender effect might differ depending on how old the candidates are or whether the candidates are leaning towards a particular party. Following the strategy proposed by Hainmueller, Hopkins and Yamamoto (2013), we estimate *average marginal component effects* (AMCEs). The AMCE represents the average difference in the probability of being the preferred judicial candidate for the German FCC when comparing two different attribute values. Thus, the AMCE represents a quantity that summarizes the overall effect of gender, i.e. being male rather than female, despite heterogeneity in effect sizes across other attributes of the judicial candidates, including age or ideology and so forth.

The AMCE of female on the choice probability can be understood as the result of the following hypothetical calculation: (1) take a female judicial candidate with a fixed but arbitrary set of attribute values and compute the probability that she is chosen over an opposing judicial candidate with another specific set of attributes. (2) Now take the attributes of this female candidate and change hypothetically her gender into male. Thus, we have constructed a hypothetical twin brother of our female candidate. (3) Next, compute the probability that this hypothetical twin brother is chosen over the same opponent judicial candidate, and take the difference between the probabilities for the female and the male judicial candidate. Then, (4) successively compute the same difference between a female and a male candidate, for all other different sets of the candidate's and opponent's attributes (other than gender). Finally, (5) take the weighted average of these differences over all possible combinations of the attributes according to their joint distribution. The resulting AMCEs provides an overall measure of how much female candidates are preferred over male candidates for the FCC.

To sum up, the key advantage of our design is that the profiles of the would-be judicial nominees are fully randomized. This allows us to disentangle and evaluate the relative importance of effects that might be otherwise correlated because in reality those attributes are bundled together. Note that since the unit of analysis when analyzing respondent's decision is the respective candidate judge profile, we realized to analyze data for $32,988$ different judicial candidates — each of our $2,749$ respondents rated up to six pairings, with two candidate profiles per pairing. To obtain accurate uncertainty assessments, we cluster the standard errors by the respondent because observed choice outcomes are obviously not independent across the profiles rated by a single respondent.

3.2 Results of the baseline model

We estimate a conditional (fixed-effect) logit model in order to predict the probability that certain judicial candidates are selected as FCC judge by the respondents based on the attribute values that make up a candidates profile. They are included in the model as a set of indicator variables for each attribute level (omitting the reference categories). Figure 2 provides an overview of the estimated AMCEs and their corresponding 95% confidence intervals of the randomly assigned attribute values of judicial candidate profiles on the probability of being selected to the Federal Constitutional Court. All AMCE estimates are presented on the vertical axis. The points represent the AMCE point estimates while the bars represent their uncertainty. The points without horizontal bars denote the attribute value that is the reference category for each attribute.

We find that on average, ideological leanings of judicial candidates have a strong negative influence relative to a candidate that does not lean towards any party. For instance, judicial candidates that lean towards extreme right (AfD) or left (Left party) parties are on average 25 (± 2) and 16 (± 2) percentage points less likely to be chosen over candidates without any partisan leanings. These are the strongest effects we find across all AMCEs we estimate. The effect of leaning towards a mainstream parties (such all the remaining parties) relative to an independent judicial candidate is around 10 percentage points.

Quality of a nominee can be inferred from his or her current occupation and the nominating process. Eligible candidates for the constitutional court need to to be at least 40 years old and have obtained a particular law degree (to be qualified to hold the office of a judge). Thus, current constitutional court judges previously served as professional judges at various levels, most notably in terms of quality are judges at a the federal court, as prosecutor or as law professors at an university. Other eligible candidates could be lawyers or, as it is often the case, politicians that possess a necessary law degree. While judges that are currently employed at a federal court seem to be the most wanted candidates, politicians are the least-liked ones. For instance, politicians are about 11 ($\pm .6$) percentage points less likely to be chosen over current judges at a federal court. Next to current federal judges respondents seem to prefer judges at the regional court and prosecutors (the difference between both AMCEs is not significant at conventional levels). They are merely slightly less preferred (about 3 $\pm .6$ percentage points). Between the most liked and the least liked occupations there is finally the group of law professors and lawyers (whose AMCEs do not differ systematically as well). They are about about 5 ($\pm .6$) percentage points less likely to be chosen over current judges at a federal court.
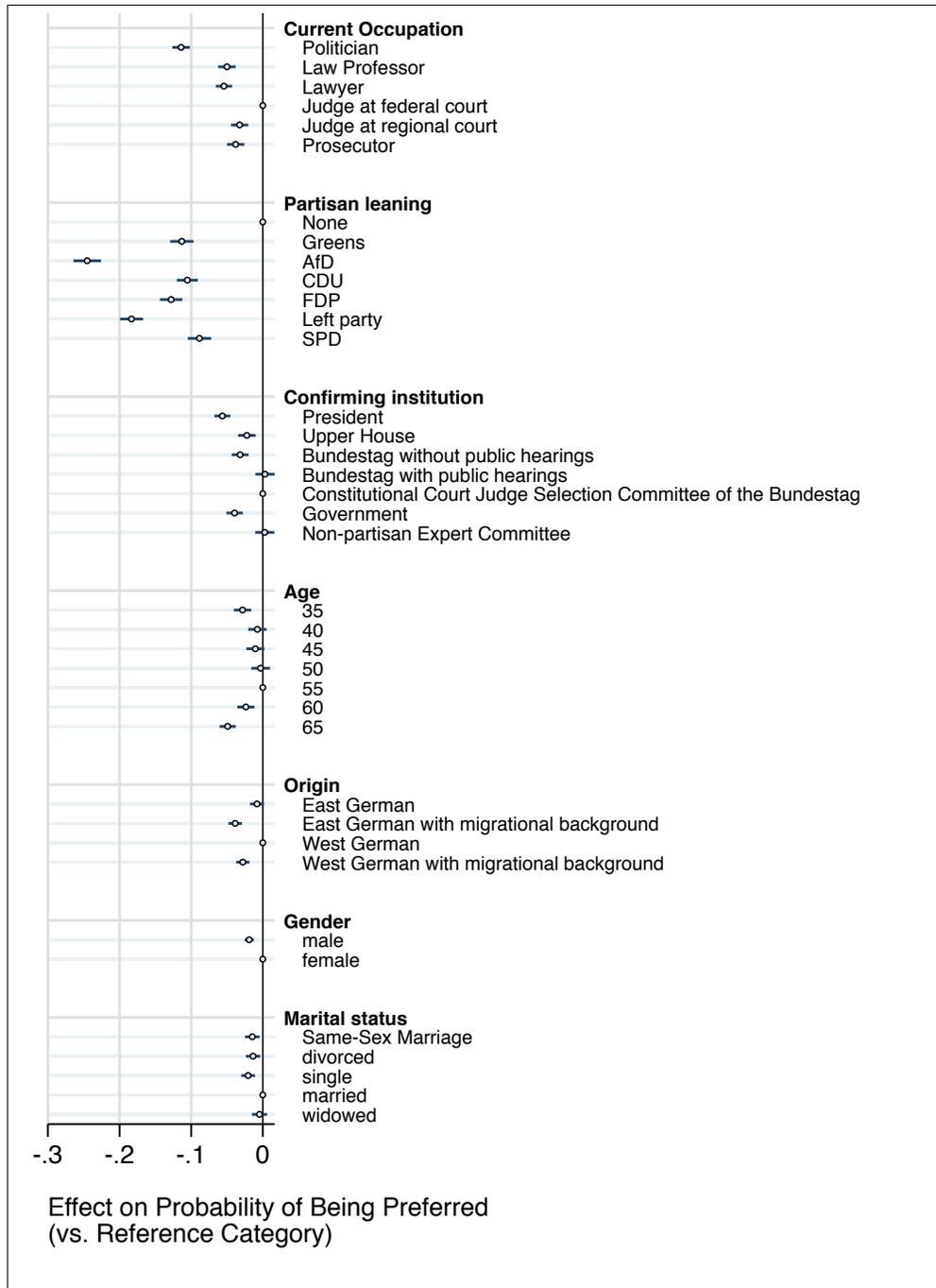
Figure 2: *This figure shows estimates of the effects of the randomly assigned attribute values of judicial candidate profiles on the probability of being selected to the Federal Constitutional Court. AMCE estimates and their 95% confidence intervals are presented on the vertical axis. The points represent the AMCE point estimates and the bars represent their uncertainty. The points without horizontal bars denote the attribute value that is the reference category for each attribute. All estimates are derived from a benchmark conditional logit model with clustered standard errors.*

The nomination process of constitutional court judges in Germany alternates between the *Bundesrat*, the upper house, and the *Bundestag*. The latter has a selection committee that used to nominate and elect the candidates with a two-thirds majority. This rule recently changed. While this committee still nominates a respective candidate the entire parliament needs to confirm each nominee without a hearing by a two-thirds majority. The results demonstrate that on average respondents seem to prefer less if judges would get nominated from other political actors such as the President or the Government. Judicial candidates that would get nominated by those political actors are about 5 ($\pm.6$) percentage points less likely to be chosen over judicial candidates nominated by the respective selection committee of the *Bundestag*. In addition to the selection committee, the most preferred options for which the AMCEs are not significant at conventional levels are when the Bundestag confirms the nominations but in contrast to current regulation *with* public hearing or through a non-partisan expert committee. Somewhat less preferred are confirmations through the upper house or the *Bundestag* without public hearings. To sum up, people seem to prefer transparency of confirmation hearings or confirmations by a non-partisan expert committee or by supposedly non-partisan or at least ideologically representative selection committee of parliament.

In general, the AMCEs are less strong for various socio-demographic attributes compared to the observable different among the values in other attributes such as current occupation, partisan leaning and, to some extend at least, the confirming institution. Would-be judges should rather be females and should be neither to young nor too old, without migration background and better not single. In a way the preferred socio-demographic characteristics of judicial candidates seem to be similar to the average of the respondents themselves.

3.3 Evaluating The Professional Traits versus Personal (Political) Traits Trade-Off

In our theoretical section we outlined that the public will prefer a judicial candidate whose characteristics are a mixture of professional traits ensuring a high quality in judicial decision-making as well as personal (political) traits ensuing that a nominee shares political believes with the public. How can we describe the substantive meaning of these baseline model's results when considering the public's mixed preferences?

Another way to approach this question is to characterize different hypothetical judicial candidates. In order to do this we disentangle this trade-off using different candidate profiles. First, we fix one profile based on all the values of the respective reference categories for every attribute. Accordingly, this nominee is a judge at a federal court that is going to get confirmed through the Constitutional Court Judge Selection

Committee of the *Bundestag*. Consequently, she ranks high in terms of quality and is politically independent, i.e. she does not lean towards any party. Given the results from the baseline model in the last section, this nominee will be on average always preferred. We compare the predicted probabilities of other judicial candidates with certain profiles and compare how likely they would get selected on average in a pairwise comparison with our baseline candidate that is politically independent and of high quality.

Second, in order to operationalize "low quality" we create a twin sister of our baseline judicial candidate that only differs on two characteristics, her current occupation (Lawyer) as well as how she is confirmed (by the President). Note that this candidate does still not lean towards any party. Third, to operationalize "political" we, again, create a hypothetical twin sister of our baseline judicial candidate. We only change that she, as a political judicial candidate, is leaning towards a political party. We simulate the expected values of how likely such a candidate would be chosen on average over the baseline judicial candidate. Building on the results from the previous section we distinguish two types of political candidates – one that leans towards the right-wing AfD while the other candidate leans to towards the center-left SPD. We also vary the respective party the candidate is leaning to in order to highlight the differences. Finally, we simulate the predicted probability that a "low quality" and "political" candidate is chosen in a pairwise comparison over the baseline candidate. Thus, we compare five hypothetical judicial candidates when competing against the most-liked high quality and non-political judicial candidate that has the values of the respective reference category for every attribute of her profile.

Figure 3 provides the simulated predicted probabilities together with their respective 95% confidence intervals for those five judicial candidates when competing against a high quality and non-political judicial candidate. Note that the respective estimation uncertainty of the predicted probabilities for each of the five pairings is always small enough that all first-differences between any two values are systematic and, therefore, not due to chance alone.

Our simulations make transparent that on average the public seem to value both professionalism and political independence similarly. A low quality candidate, although not leaning towards any party would loose against our high-quality and politically independent candidate on average with 31 : 69. That is a 38 percentage point difference. When the candidate is of high-quality but not politically independent the picture is more fine-grained. For a would-be high-quality judge that is leaning towards a mainstream party, such as the SPD, our simulations show that she would loose against our high-quality and politically independent candidate on average with 38 : 62. That is merely a 24 percentage point difference. Moreover,
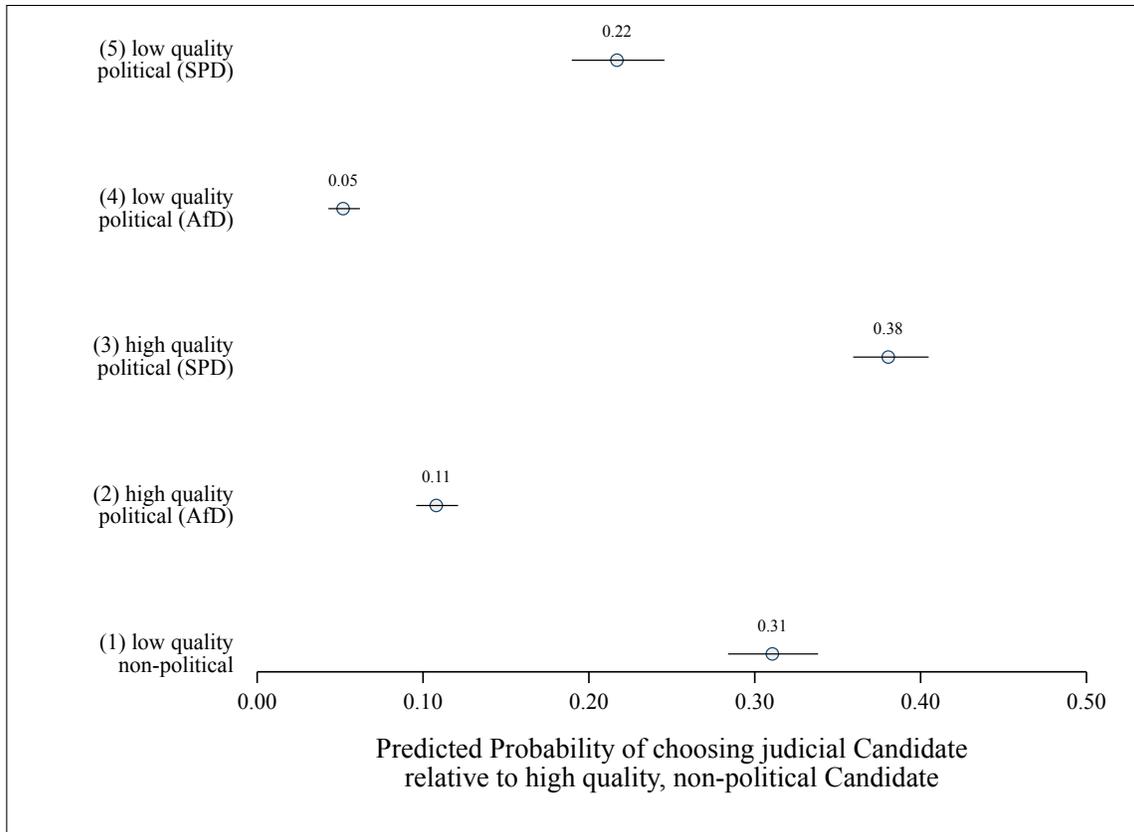
Figure 3: *This figure shows the simulated predicted probabilities of five different candidates when competing against a non-political, high-quality judicial candidate. All simulations are derived from estimated coefficients of a benchmark conditional logit model with clustered standard errors.*

this candidate has slightly better chances than the low-quality but politically independent candidate, which would loose against our high-quality and politically independent candidate on average with 31 : 69. Thus, as long as candidates lean towards mainstream parties, respondents seem to value quality more than political independence.

The situation changes, however, if our high-quality judicial candidate is leaning towards a more extremist party, such as the AfD. In this situation the bonus of being considered a high-quality candidate is almost not existent. A high-quality candidate that leans towards the AfD would loose on average 11 : 89 against a politically independent candidate of the same high-quality while she would loose 5 : 95 if she would also be considered a low-quality candidate. While systematic, the difference of quality for an judicial candidate that leans towards an extremist party is not a substantively large effect by any means. Moreover even a politically independent but low-quality candidate would be more likely to be preferred than a high-quality candidate if she leans towards a more extremist rather than a mainstream political party.

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To sum up, the importance of professionalism in terms of quality for a judicial candidate is in the eyes of the public unquestionable. Quality, however, cannot compensate for too extreme ideological preferences of a would-be judge. Quality can compensate for moderate ideological preferences, though. Thus, leaning towards a mainstream party is a weakness that can get compensated to some degree by quality. The public prefers a high-quality candidate that leans towards the SPD rather than a low-quality candidate that does not lean towards any party. If they had the choice, citizens prefer a very qualified judge that nevertheless leans towards a mainstream political party over a less-qualified but politically independent judge. Comparing the simulated probabilities between candidates who lean towards mainstream as opposed to extremist parties shows that it does matter how extreme the party is perceived ideologically. This aspect deserves a closer look in the our final section.

3.4   How Important is Perceived Ideological Distance to a Judge Relative to Quality?

In the previous section we have seen that citizens generally prefer a very qualified judge that nevertheless leans towards a mainstream political party over a less-qualified but politically independent judge. Our conclusion is that quality can compensate for missing political independence of a would-be judge. This does not hold unconditionally. One can imagine that there is a an acceptable perceived ideological distance to the party the candidate is leaning towards until then citizens are willing to prefer a high-quality judicial candidate over a politically independent judicial candidate of low quality.

In order to better understand this trade-off we include another independent variable into our model, the ideological distance between each respondent an the respective judicial candidates. We code ideological distance as the perceived absolute ideological distance between the perceived position of the party a judge is leaning to and the respondent's self-placement using the typical left-right 1-11 scale. The resulting distance ranges between $0 - 10$. The mean ideological distance to the judicial candidates the respondents got assigned is 2.3 with a Standard Deviation of 2.2.[1] Figure 4 provides an overview over the estimated AMCEs for the model including ideological distance. The results are very similar to the baseline model we estimated previously with the exception of the ideological dimension. Controlling for the perceived ideological distance the difference between parties essentially disappears. The only exception seems to be the AfD, for which we can identify a huge valence disadvantage of more than 10 percentage points. Additionally, candi-

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[1]We set the ideological position of a politically independent judge to be at the same position where the respondent places herself on that scale.
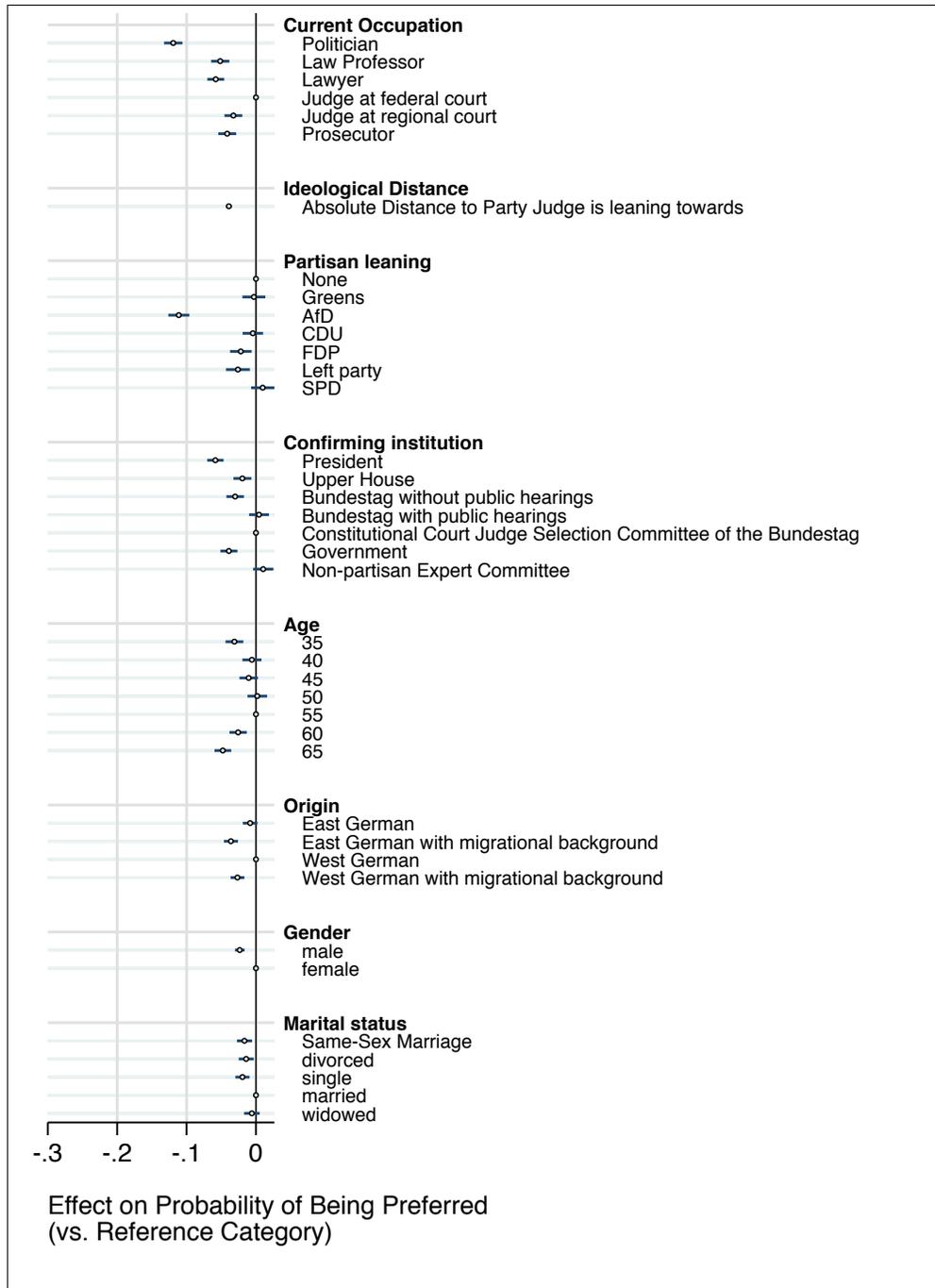
Figure 4: *This figure shows estimates of the effects of the randomly assigned attribute values of judicial candidate profiles on the probability of being selected to the Federal Constitutional Court including the absolute distance between the respondent's ideological self-placement and the placement of the respective party a judge is leaning towards. AMCE estimates and their 95% confidence intervals are presented on the vertical axis. The points represent the AMCE point estimates and the bars represent their uncertainty. The points without horizontal bars denote the attribute value that is the reference category for each attribute. All estimates are derived from a benchmark conditional logit model with clustered standard errors.*

dates leaning towards the FDP and the Left party encounter also small but systematic valence disadvantages. Moreover the effect of ideological distance is real and not due to chance. It indicates that citizens on average prefer judicial candidates that lean towards a party that is closer to their ideological position if no politically independent nominee is present.

How important is the perceived ideological distance to a judge relative to her or his quality? While we have shown above that the quality of a judicial candidate can compensate for missing political independence, a would-be judge should probably not be ideologically too extreme before the average marginal effect of quality is used up. How far can this distance on average be before respondents start to prefer a low-quality nominee that does not lean to any party?

In order to answer this question we employ the estimates from our model including ideological distance and simulate the choice probabilities when deciding between either a high-quality political judicial candidate and a low-quality but politically independent judicial candidate. All other profile attributes are fixed at the values of the respective reference categories.

Figure 5 provides an overview about the respective choice probabilities between a high-quality political judicial candidate and a low-quality but politically independent judicial candidate depending on how large the perceived absolute ideological distance is. We simulate the choice probabilities for two high-quality judges that lean either towards the extremist AfD or the mainstream SPD and let the perceived distance between respondents and those political judicial candidates vary across the entire range between 0, where the respondent's ideological self-placement and the placement of the party coincide, and 10, where they are perceived to be maximally apart. [2]

Quality cannot compensate for too extremist positions. In general, a high-quality judge that leans towards an extremist party such as the AfD will be never preferred over a low-quality but politically independent judge. The respective choice probabilities are consistently below 50 percent. This indicates that the low-quality but politically independent nominee will be always preferred independently from the respondent's ideological position (or the perceived distance to the candidate). For judicial candidates that lean towards mainstream parties, implying that they themselves are more moderate ideologically, the situation is different. Here quality can in fact compensate for some perceived distance on a ideological dimension. Of

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[2]We use a parametric bootstrap approach and calculate the respective choice probabilities based on 1000 draws from a multivariate normal distribution with a mean equal to the estimated coefficients and a variance that equals the estimated variance-covariance matrix of our conditional (fixed-effect) logit model that controls for ideological distance.
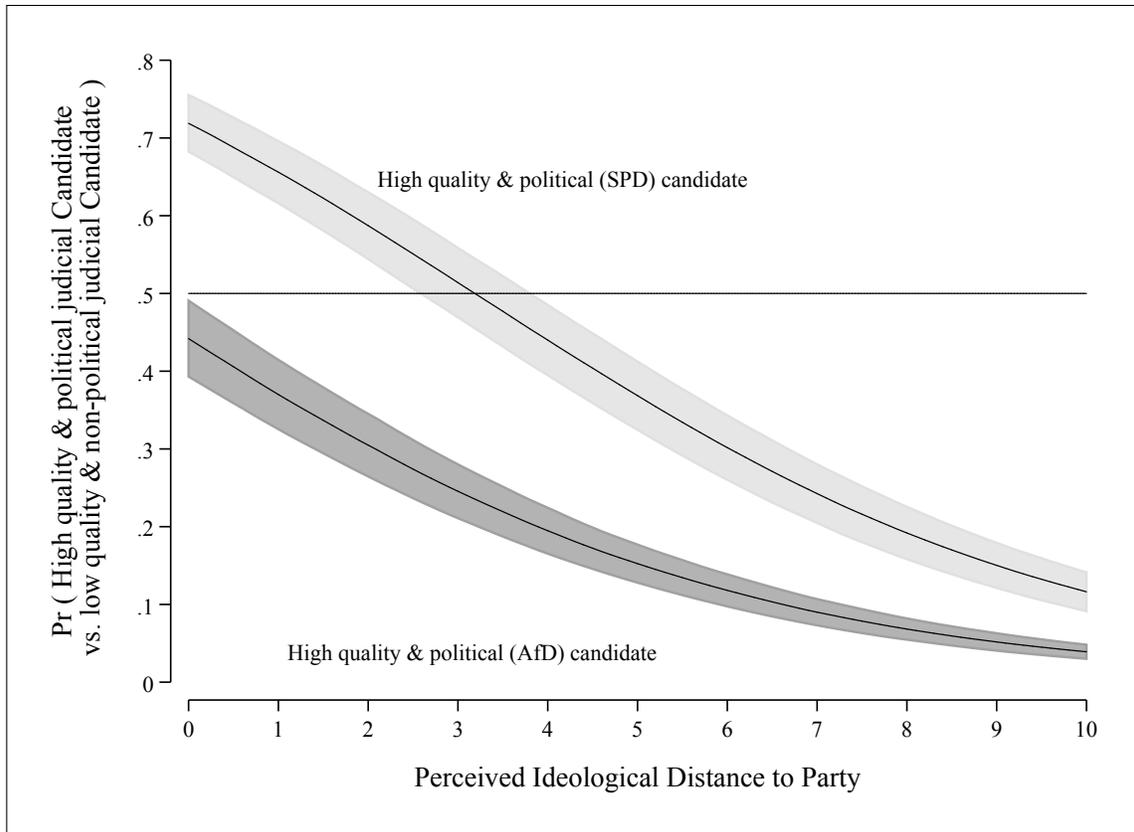
Figure 5: *This figure shows the estimated effect of perceived ideological distance on the predicted probability to prefer a high-quality (but political) judicial nominee vs. a low-quality but politically independent judicial nominee. All predicted probabilities are derived from a benchmark conditional logit model that with clustered standard errors controlling also for ideological distance.*

course, respondents prefer the smallest possible distance, they are willing to "pay the cost" for an ideological distance as long as the they get compensated by getting a highly qualified judge. For the case of a high-quality nominee that leans towards the SPD respondents are willing to accept her rather than a less-qualified but politically independent judge if the distance is lower than 2.6. In that range, the 95% confidence interval of the simulated choice probability is systematically above the 50 percent reference line. Between 2.6 and 3.7 the model's prediction is unsure about the outcome, while a perceived distance that is larger than 3.7 would be too large. Respondents would not prefer the high-quality judicial candidate any more but instead they would prefer the politically independent judicial candidate even if she or he seems to be less qualified.

To sum up, quality can compensate for missing political independence of a would-be judge to some degree. Citizens are generally willing to prefer a highly qualified but political candidate over less-qualified but politically independent nominee as long as the political judicial candidate is not to extreme and leans

towards a mainstream party.

4   Conclusion

This article argues that constitutional courts are non-elected actors similar to Non-Majoritarian Institutions in a principal-agent framework. Judges (the agents) are delegated the power and competence by political rulers (the principals) to administer the law and to resolve conflicts. To perform these task courts enjoy high institutional power and independence. The selection of judicial nominees is one of the few means political rulers have at their disposal to exert some control over an actor who is normally beyond their reach. When selecting an appropriate candidate, political rulers face a trade-off to choose between an isolated independent trustee or a politically closer tied agent. While a qualified, independent trustee receives a higher output-legitimacy by the public, a partisanship based selection of judges ensures that the agent's interests are in line with the principal's. It is complicated for political rulers to make the "right" choice between a trustee and an agent because the public's preferences on judicial nominee are often unknown.

To overcome this gap and to identify the public's preferences for different types of judicial nominees, we administer a discrete-choice experiment to a random sample of German citizens. We repeatably present respondents pairs of profiles of judicial nominees that depend on several attributes representing partisan and quality characteristics. Evaluating the public's rating of those profiles allows us to disentangle these dimensions and to test which profiles gain the most public support.

Not surprisingly, we find that citizens like highly qualified and politically independent candidates. However, we also observe some interesting trade-offs going on when the ideal candidate is not in the set of choices. As long as candidates lean towards mainstream parties, respondents seem to value quality more than political independence. Thus, they prefer the robe more than the policy-maker wearing it. Citizens are generally willing to prefer a highly qualified but political candidate over a less-qualified but politically independent nominee. However, a closer look at mainstream and extremist parties reveals that high quality cannot compensate for too extremist positions. A high-quality judge leaning towards an extremist party will never be preferred over a low-quality judge without a party leaning.

We make two contributions. First, the experimental design of our study allows us to systematically disentangle the partisan and quality dimension of judicial candidates, something that has not been done yet for any European constitutional court. Second, our findings can provide some guidelines for political actors

when choosing an appropriate candidate for the bench. As long as they belong to the mainstream parties, political rulers can afford to nominee a partisan but highly qualified candidate, as qualification will always compensate for political dependence.

In the future, we plan to extend our research in several ways. We want to use another dependent variable, namely a like-dislike score of the very same judges for the exact same pairings to get a more fine-grained analysis of how much candidates are preferred over each other. Further analysis will be able to look at the stability of our results over time, given that we replicated the very same design in a second wave. This can tell us how consistent the publics' choices are over time. Lastly, we also asked respondents for their knowledge about the German constitutional court. This enables us to find out whether there are significant differences in the preferences of citizens depending on how knowledgeable they are.

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